IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 5, 2003 Session

J.W.G. v. T.L.H.G.

Appeal from the Juvenile Court for Montgomery County
No. 76-74 Wayne C. Shelton, Judge

No. M2002-02656-COA-R3-JV - Filed November 25, 2003

This is a child custody case. At an earlier time – on October 15, 1996 – J.W.G. ("Father") petitioned the juvenile court for custody of his daughter, H.N.G. (DOB: 8/24/96) ("the child"). The juvenile court granted Father custody of the child. Later – on October 12, 1997 – Father married the child's mother, T.L.H.G. ("Mother"). The parties were divorced in May, 2001. The chancery court, in granting the divorce, gave the parties joint custody of the child, naming Mother as the primary residential custodian. Later that year, the chancery court, acting on Father's petition, reversed its order of custody, holding that it did not have jurisdiction to determine custody. Subsequently, the juvenile court, following a hearing, again awarded custody to Father. Mother appeals, arguing that, contrary to the chancery court's ruling, the juvenile court did not have exclusive jurisdiction to determine custody; that the trial court's findings are not supported by the evidence; and that a parenting plan was never submitted to the trial court. By way of a separate issue, Father argues that Mother's notice of appeal is deficient. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and HERSCHEL P. FRANKS, J., joined.

Thomas R. Meeks and Gregory D. Smith, Clarksville, Tennessee, for the appellant, T.L.H.G.

Rodger N. Bowman, Clarksville, Tennessee, for the appellee, J.W.G.

OPINION

I.

The child was born to the parties on August 24, 1996. While the parties had been dating for approximately one year, they were not married. Two days after the birth of the child, Mother and

Father executed a voluntary acknowledgment of paternity, pursuant to Tenn. Code Ann. §§ 68-3-203(g), -302, -305(b) (2001 & Supp. 2003).

On October 15, 1996, Father filed a petition for custody in the juvenile court, alleging, *inter alia*, that Mother had exhibited violent tendencies; that she "[was] not a fit and proper mother" and that, in the past, she had "evidenced desire to do harm to the child"; that the child would "suffer immediate and irreparable loss, injury or damage" if the court did not grant Father's petition; and that it would be in the child's best interest to grant custody to Father. On the day the petition was filed, the juvenile court granted temporary custody of the child to Father. By order entered October 23, 1996, the court granted Father sole custody of the child.

The parties reconciled in late 1996. On October 12, 1997, Mother and Father married. Three-and-a-half years later, the parties divorced. As a part of the divorce judgment, entered May 11, 2001, the chancery court granted the parties joint custody of the child, naming Mother as primary residential custodian. In August, 2001, Mother filed a petition for contempt in the chancery court divorce case, alleging that Father had obtained a domestic assault warrant against Mother and that he had failed to return the child to Mother as required by the terms of the divorce judgment. Father then filed a motion to dismiss the petition, as well as a petition for a restraining order, contending that the chancery court lacked jurisdiction to determine the custody of the child. In December, 2001, the chancery court reversed itself, holding that it did not have jurisdiction over the child's custody. In so holding, the court concluded that the juvenile court had exclusive jurisdiction to determine the child's custody as a result of the entry of that court's earlier order of October 23, 1996.

Following the chancery court's order, Father filed a petition with the juvenile court seeking to enforce that court's earlier custody order. At the conclusion of a hearing, the juvenile court entered an order on September 23, 2002, awarding Father custody of the child. Two days later, the juvenile court ordered the sheriff to accompany Father to pick up the child from Mother. From this judgment, Mother appeals.

II.

In this non-jury case, our review of the trial court's factual findings is *de novo*; however, the case comes to us accompanied by a presumption that those findings are correct – a presumption that we must honor unless the evidence preponderates against the trial court's factual findings. Tenn R. App. P. 13(d); ***Musselman v. Acuff***, 826 S.W.2d 920, 922 (Tenn. Ct. App. 1991). Our search for the preponderance of the evidence is tempered by the principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such determinations are entitled to great weight on appeal. ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995); ***Bowman v. Bowman***, 836 S.W.2d 563, 566-67 (Tenn. Ct. App. 1991).

III.

The issues in this case implicate the provisions of Tenn. Code Ann. § 37-1-103 (2001)[1], which provide, in pertinent part, as follows:

> (a) The juvenile court has exclusive original jurisdiction of the following proceedings, which are governed by this part:
>
> (1) Proceedings in which a child is alleged to be . . . dependent and neglected, . . .;
>
> (2) All cases to establish paternity of children born out of lawful wedlock; to provide for the support and education of such children, and to enforce its orders;
>
> * * *
>
> (c) When jurisdiction has been acquired under the provisions of this part, such jurisdiction shall continue until the case has been dismissed, or until the custody determination is transferred to another juvenile, circuit, chancery or general sessions court exercising domestic relations jurisdiction, ... Notwithstanding any other law to the contrary, transfers under this provision shall be at the sole discretion of the juvenile court and in accordance with § 37-1-112. In all other cases, jurisdiction shall continue until a person reaches the age of eighteen (18), ...

IV.

Before considering Mother's issues, we must first address Father's issue challenging the sufficiency and effect of Mother's notice of appeal. In the notice, which was filed on October 18, 2002, Mother expressly referred to the last juvenile court order of September 25, 2002 – the order in which the juvenile court directed the sheriff to pick up the child from Mother; however, in her brief, she raises issues pertaining to the trial court's earlier order of September 23, 2002, in which the juvenile court awarded Father custody of the child. Father contends that by referring to the later order of September 25, 2002, in her notice of appeal, Mother has deprived herself of the right to raise issues pertaining to the order of September 23, 2002. In support of his contention, Father points to the language of Tenn. R. App. P. 3(f) providing that the appealing party "shall designate the

[1]Tenn. Code Ann. § 37-1-103 was amended effective July 1, 2003 by deleting subsection (a)(2). However, this amendment is not implicated by the facts of this case since this action was commenced and concluded prior to July 1, 2003.

judgment from which relief is sought." He argues that she "designate[d]" the September 25, 2002, order, and should be bound by her designation.

We note that the notice of appeal was filed within 30 days of *both* the September 23, 2002, order and the September 25, 2002, order. In other words, the notice of appeal was timely filed with respect to both orders. Clearly, timeliness is not the issue. We must decide whether Mother's failure to expressly refer to the order of September 25, 2002, precludes her from raising issues with respect to that order. We have concluded that it does not.

This court has held that a party's failure to specify the order from which it is seeking relief "does not preclude this court from reviewing the issues raised by the [party] in [its] brief." ***Dunlap v. Dunlap***, 996 S.W.2d 803, 810 (Tenn. Ct. App. 1998). We also note the following from the advisory commission's comment to Tenn. R. App. P. 3(f):

> This subdivision specifies the content of the notice of appeal. The purpose of the notice of appeal is simply to declare in a formal way an intention to appeal. *As long as this purpose is met, it is irrelevant that the paper filed is deficient in some other respect. Similarly, the notice of appeal plays no part in defining the scope of appellate review.* Scope of review is treated in rule 13. This subdivision read in conjunction with rule 13(a) permits *any question of law to be brought up for review* [except as otherwise provided in rule 3(e)] as long as any party formally declares an intention to appeal in a timely fashion.

(Emphasis added). *See also* ***Oakley v. State***, No. W2002-00095-COA-R3-CV, 2003 WL 103215, at *6 (Tenn. Ct. App. W.S., filed January 8, 2003); ***Glidden v. Glidden***, No. 86-320-II, 1987 WL 9452, at *1-*2 (Tenn. Ct. App. M.S., filed April 16, 1987).

We conclude that, having timely filed her notice of appeal, Mother is not precluded from raising issues pertaining to the earlier order. The notice of appeal formally declared Mother's intention to appeal. That notice was sufficient to vest this court with jurisdiction to consider, at a minimum, any and all issues raised by Mother pertaining to all decrees formalized by court orders entered within 30 days of the filing of the notice of appeal. To hold otherwise is to triumph form over substance.

V.

A.

Mother argues that the juvenile court did not have exclusive jurisdiction to determine which of the child's parents should be awarded custody of the child. This appears to be an oblique challenge to the chancery court's ruling to the contrary. That ruling was not appealed. An appeal

of that decision would have been the appropriate way to raise the issue now before us. This is because, if we had agreed with Mother's position on the issue of whether the chancery court had jurisdiction to address the issue of the child's custody, we would have been in a position to remand the divorce case to the chancery court. The failure of Mother to pursue an appeal of the chancery court divorce deprives us of this potential avenue of relief. However, all of this is academic because we hold that the juvenile court did have exclusive jurisdiction regarding the custody of the child as a result of what occurred in that court in 1996.

The law is well-settled that, once a juvenile court has exercised jurisdiction over a child in a dependency and neglect proceeding, that court retains exclusive jurisdiction over that child until the child reaches the age of majority, or until the juvenile court dismisses the case or transfers it to another court. Tenn. Code Ann. § 37-1-103; *see* ***Kidd v. State ex rel. Moore***, 207 Tenn. 244, 251-52, 338 S.W.2d 621, 625 (1960); ***State of Tennessee Dept. of Human Servs. v. Gouvitsa***, 735 S.W.2d 452, 454-57 (Tenn. Ct. App. 1987); ***Marmino v. Marmino***, 34 Tenn. App. 352, 357-58, 238 S.W.2d 105, 108 (1950). Moreover, once the juvenile court has invoked its exclusive jurisdiction, "any subsequent order concerning custody entered by the court having jurisdiction over the original divorce proceeding is void." ***Branch v. Thompson***, No. M1998-00511-COA-R3-CV, 2000 WL 898759, at *3 (Tenn. Ct. App. M.S., filed July 7, 2000) (citing ***Gouvitsa***, 735 S.W.2d at 457).

While Mother agrees that a juvenile court has exclusive jurisdiction when it initially exercises jurisdiction pursuant to Tenn. Code Ann. § 37-1-103, she contends that the initial decision of the juvenile court in the instant case was not made in a dependency and neglect proceeding. As a consequence of this, so the argument goes, the juvenile court did not have jurisdiction to address the issue of custody to the exclusion of the jurisdiction of the chancery court.[2] Mother bases her argument on the fact that the initial petition filed by Father in the juvenile court was styled, in relevant part, as a "Petition for Custody of Minor Child," rather than as a petition to have the child declared dependent and neglected.

Our review of Father's petition in juvenile court reveals that he made the following allegations: that Mother has demonstrated violent tendencies; that Mother has assaulted him on several occasions; that Mother was incarcerated for one day following an attack on Father; that Mother was required to attend anger-management classes; that upon her release from jail, Mother began "striking herself in the stomach, while pregnant with [the child], in an attempt to cause a spontaneous abortion"; that Mother's older two children had been taken from her pursuant to a court order due to Mother's violence; that Mother "has in the past evidenced desire to do harm to the child, does not have sufficient wherewithal to care for the child, and is not a fit and proper mother to be

[2]Father argues that, as Mother failed to raise the issue of subject matter jurisdiction before the juvenile court, that issue has been waived on appeal. Father relies on Tenn. R. Civ. P. 12.08, which states that all defenses not raised by a party are considered waived. However, it is a fundamental legal principle in this state that the defense of a lack of subject matter jurisdiction cannot be waived, "because it is the basis for the court's authority to act." ***Meighan v. U.S. Sprint Communications Co***., 924 S.W.2d 632, 639 (Tenn. 1996); *see* Tenn. R. Civ. P. 12.08 committee comment ("[T]he waiver does not apply to the defense of lack of jurisdiction over the subject matter . . . .").

caring for the child at this time"; and that the child will "suffer immediate and irreparable loss, injury or damage" if the court does not restrain Mother from removing the child from Father's home.

While Father does not expressly allege that the child is "dependent and neglected," the allegations in his petition, if true, are tantamount to allegations of dependency and neglect. *See* Tenn. Code Ann. § 37-1-102(b)(12)(B), (C), (F), (G) (2001 & Supp. 2003). In granting sole custody to Father, the juvenile court found Father's petition to be "well taken," indicating that it had found Father's allegations to be true. Therefore, we hold that the juvenile court treated this petition as one of dependency and neglect. As such, the juvenile court correctly invoked its exclusive jurisdiction over the child, pursuant to Tenn. Code Ann. § 37-1-103. Accordingly, we find Mother's first issue to be without merit.

B.

Mother next argues that the evidence does not support the juvenile court's findings that an award of custody to Father is in the best interest of the child. We disagree with Mother's contention.

As previously alluded to, the trial court is in the best position to assess the credibility of witnesses, and such determinations are entitled to great weight on appeal. *See* ***Massengale***, 915 S.W.2d at 819; ***Bowman***, 836 S.W.2d at 566-67. The juvenile court, in its findings of facts and conclusions of law, stated the following:

> That [Mother] is an admitted manic depressive;
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> That [Mother] is unpredictably violent and has demonstrated her violence in the presence of her children;
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> That [Mother] has not shown a change of circumstances since the entry of this Court's prior Order [of custody] which would in the best interest of the child require that Order to be set aside;
>
> The Court finds from all of the evidence that [Father] is a good parent and provides a stable and loving home;
>
> That it is in the best interest of the child, . . . , that her custody remain with [Father] and that it is in the best interest of the child, . . . , that her custody be placed with [Father];
>
> The Court has considered the love, affection and emotion[al] ties that exist[] between each of the parents and the child; the disposition of the parents to provide the child with food, clothing, medical care, education, and other necessary care and the degree to which the parent has been the primary care giver; the primary importance of

> continuity in the child's life and the length of time that the child has lived in the stable, satisfactory environment; the stability of the family units of the parents; the mental and physical health of the parents; the home, school and community record of the child; evidence of physical and emotional abuse to the child or to the other parent; the character and behavior of any other person who resides in or frequents the home of a parent and such person's interaction with the child and each of the parents['] past and potential for future performance of parenting responsibilities.
>
> The law requires this Court to determine what is in the best interest of the child or how is that best interest served. The Court concludes that the best interest of the child, . . . , is served by the custody remaining with [Father], as heretofore ordered by this Court and [Father] be granted custody of the said [child].

(Numbering in original omitted). After reviewing the record, we cannot say that the evidence preponderates against these findings. Accordingly, we will not disturb the juvenile court's award of custody to Father.

C.

Finally, Mother asserts that this case should be remanded to the juvenile court for the entry of a parenting plan. Mother correctly points out that the juvenile court, in its September 23, 2002, judgment, ordered the parties to submit an agreed parenting plan within 30 days of the entry of the order. Mother argues that Father never submitted such a plan.

As we have previously noted, Mother filed her notice of appeal on October 18, 2002. This was five days *before* the expiration of the period specified by the trial court for the filing of the parenting plan. The record does not affirmatively reflect whether either or both of the parties complied with the trial court's directive; but the filing of the plan is not material to the validity of the award of custody to Father. The trial court can address the matter of the parenting plan upon remand.

VI.

The judgment of the trial court is affirmed. This case is remanded to the trial court for such further proceedings, if any, as may be required and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, T.L.H.G.

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CHARLES D. SUSANO, JR., JUDGE